No. 93-517, 527, 539

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

against

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

[Caption Continued on Inside Cover]

On Writ Of Certiorari To The New York State Court Of Appeals

BRIEF FOR RESPONDENTS

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BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

QUESTION PRESENTED

Whether the New York State Court of Appeals correctly held that Chapter 748 of the Laws of 1989 entitled "An Act to establish a separate school district in and for the Village of Kiryas Joel, Orange County," violates the Establishment Clause of the United States Constitution because it confers upon an exclusive religious community the extraordinary benefit of a separate public school district to enable that community to receive already available public education services in an environment which conforms with the community's religious beliefs and traditions.

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

A. About the Satmar Hasidim.

The Satmar Hasidim who comprise the population of the Village of Kiryas Joel located in Orange County, New York ("the Village"), are members of an Orthodox Jewish sect representing one of the dynastic rabbinical courts which rose in the 18th century in Eastern and Central Europe. The Satmar sect is the most conservative and traditional of the Hasidic courts. According to scholars well-versed in Hasidic religious precepts, Satmar Hasidim believe in a literal interpretation of Scripture and the teachings of the Torah. The Talmud (the book of Jewish law and tradition) serves to guide every aspect of their life from dress to diet. Central to Satmar beliefs and way of life is the drawing of cultural boundaries between the Satmar community and the rest of society. These boundaries are accentuated by their dress, the language they speak, and their system of education which focuses mostly on religious studies. Affidavit of Israel Rubin, ¶¶ 7-15 (Resp. App. 15-17); 2 R. 447-448, 451-457.[1] *See*, Rubin, Satmar: An Island in the City (Quadrangle Books

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[1] "J.A.___" refers to the Joint Appendix. "___ R. ___" refers to the printed three-volume record filed in the New York Court of Appeals. "Resp. App. ___" refers to the Appendix to Respondents' Opposition to a Writ of Certiorari in Nos. 93-517, 93-527, and 93-539. "K.J. Pet. App. ___" refers to the Appendix to the Petition for a Writ of Certiorari in No. 93-517. "KJ Brief", "MW Brief" and "AG Brief" refers to the briefs submitted by petitioners in Nos. 93-517, 93-527, and 93-529 respectively.

1972); Mintz, Hasidic People, A Place in the New World" (Harvard University Press 1992); Kephart, Extraordinary Groups (St. Martin's Press 1991). In addition to separation from the outside community, Satmarer also observe separation of the sexes with few exceptions, such as within the confines of the immediate family, and in the case of children with disabilities. Gender separation is required to avoid "impure thoughts" which may cause a violation of the sexual code. Affidavit of Israel Rubin, ¶¶ 18-19 (Resp. App. 18); 2 R. 458-459.

Hasidim, including Satmarer, subscribe to a distinctive social order centered around the individual sect's religious leader known as the Rebbeh, who is the ultimate decision-maker in all matters of concern to his followers. A Rebbeh exercises his religious authority over all aspects of the life of members of his court. *Id.* at ¶¶ 8-9, 11 (Resp. App. 15, 16). Individuals questioning the Rebbeh's authority risk expulsion from the congregation and ostracism. For example, during the election to establish the first board of education for the school district at issue before this Court, the only candidate to run for election without the endorsement of the Rebbeh was expelled from the Village's main congregation, and his children expelled from the Village's religious schools after he refused to renounce his candidacy. *Waldman v. United Talmudic Academy*, 147 Misc.2d 529 (1990); 3 R. 592-641. Hasidim, including the Satmarer, further provide for their own self-governance by maintaining a separate system of justice, education and welfare. *See*, Affidavit of Israel Rubin ¶¶ 15-16; (Resp. App. 17); 2 R. 454-456.

The Satmar Hasidim came to the United States after World War II. Originally settling in the Williamsburg

section of Brooklyn in New York City, the Satmarer have since established additional communities at other locations in New York State, including Borough Park, also in Brooklyn, Monsey in Rockland County, and the Village of Kiryas Joel. *Id.* at ¶¶ 8,10 (Resp. App. 15-16). These population centers are led by a Rov or "town rabbi" appointed by the Rebbeh. Rovs enjoy a more modest form of status and authority than the Rebbeh, but nonetheless play a significant role in the leadership process. The Rov of the Village of Kiryas Joel, appointed by the Rebbeh himself, is the Rebbeh's son, Aaron Teitelbaum. *Id.* at ¶¶ 11-12 (Resp. App. 16).

From the time of their arrival in the United States, Satmarer have endeavored to protect their identity, rejecting attempts at acculturation and organizing separate communities with their own social structure and government. *Id.* at ¶¶ 7,14 (Resp. App. 15, 16). *See*, Mintz, Hasidic People at 27-42. Unlike the Amish, however, the majority of Hasidim find work outside their community. 2 R. 462.

To prevent undesirable acculturation, Satmarer, for instance, do not generally use television, radio or English language publications. Nor do they allow their children to attend school with others who belong to cultures deemed undesirable for Satmarer. Affidavit of Israel Rubin, ¶ 16 (Resp. App. 17); *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986). Instead, Satmar children attend private religious schools established by the Satmar leadership to serve as the chief instrument for transmitting Satmar culture to future generations. Affidavit of Israel Rubin, ¶ 15 (Resp. App. 17). The majority

of boys and girls in the Village attend the official religious schools, although others attend a separate school organized by six Village families whose children were expelled from the official religious schools after the parents were accused of being disloyal to the religious leadership for questioning the quality of education being provided in the official religious schools. *Id.* at ¶ 13 (Resp. App. 16); 2 R. 436-439.

B. About the Village of Kiryas Joel.

Despite representations to the contrary, the incorporation of the Village of Kiryas Joel was not without controversy. (KJ Brief at 3-5). After the Satmar Hasidim's arrival in the Town of Monroe in the 1970s, a bitter contest ensued as the Satmarer sought to oppose the Town of Monroe's efforts to enforce its zoning regulations. (J.A. 8-16). The Satmar Hasidim presented the Town with an incorporation petition during the pendency of litigation over these issues.

Under the applicable statutory provisions, the Town Board was "foreclosed from passing upon the public good-or lack of it-in forming such a village" (J.A. 12, 14). Indeed, the Town Supervisor approving the petition observed that the Satmarer had "taken advantage of an . . . archaic State statute" which not only allowed them to evade the Town's zoning regulations but also to preclude the Town from advancing any objections to the formation of the new village. (J.A. 13-14). Because the area incorporated within the Village already had access to water supply, police and fire protection and sewer systems-the traditional factors prompting the need for self

incorporation-the Town Supervisor questioned the Satmar's need to incorporate. (J.A. 9-10).

In an effort to identify the reasons as to why the Satmarer might have wanted to incorporate their community into a Village, the Town noted several possible economic and sociological factors, including the Satmarer's preference for "disdained isolation from the rest of the community" (J.A. 10). In this context, he expressed his hope that the incorporation of the Village would bring about "a new era of well-being" between the Satmarer and the rest of Monroe, and that the Satmarer would understand they are not "above or separate" from the rules and regulations which govern "the people in whose midst they have chosen to reside" (J.A. 15).

The incorporation provided the Village residents an opportunity not only to enact their own zoning laws, but also to create an isolated community shielded from outside influences and governed by Orthodox religious tenets. Failure by the Satmarer "to adopt to some of the ways of life" of the surrounding community, the Town Supervisor feared, or continued attempts "to hide behind the self-imposed shade of secrecy or cry out religious persecution where there is none, will only lead to more confrontations as bitter as the one [his] decision purporte[d] to resolve" *Id.*

C. Prior litigation between the Satmarer and Public School Authorities.

Disputes over the delivery of remedial instruction, transportation and special education services to the Satmar

community have been the subject of judicial review in previous cases.

Parents' Assn. of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986), involved efforts by the New York City Board of Education to provide remedial instruction to female students attending Satmar religious schools in the Williamsburg section of the City-the original and largest Satmar population center in New York State. Prior to this Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), the services had been offered within the premises of the students' private religious schools. Thereafter, the City Board of Education adopted a plan to close off nine classrooms at P.S. 16 for the exclusive use of the Satmar students, where remedial services would then be provided separately from similar classes for the public school students.

The plan also provided for the assignment of only female, Yiddish-speaking teachers to teach the Satmar girls. 803 F.2d 1236-1237. However, the basis of the complaint filed to challenge the plan was that an establishment of religion in contravention of the First Amendment resulted from the erection of walls to separate Satmar and non-Satmar students which made the non-Satmar students feel "the walls [were] there to keep them out and that there are people who consider them undesirable" *Id.*

The United States Court of Appeals for the Second Circuit determined that the plan created a "symbolic link" between the state and the Satmarer which was likely to be perceived by the Hasidim and others as

governmental support for the separatist beliefs and practices of the Satmar community. Moreover, to impressionable young minds, the plan would appear to endorse not only separatism but the derogatory disdain of the Satmar for other cultures. 803 F.2d 1241.

In its decision, the *Quinones* court noted statements made by various members of the Hasidic community which reflect the intrinsic separatist position of the Satmar community. According to one such member,

> [the Satmar Hasidim] struggle very hard to maintain [their] belief and [their] culture . . . [They] want [their] children separate . . . The issue goes to the heart of the Orthodox tradition, which requires the separation of males and females for virtually every activity, including schooling, and encourages isolation from other cultures. If we have our kids learning with them, they'll be corrupted . . . We don't hate these people, but we don't like them. *We want to be separate. It's intentional.* 803 F.2d 1238 (Emphasis added).

At present, the school district created by the statute before this Court is responsible for providing to the Village's parochial school students services similar to those provided in *Quinones* in an exclusive Satmar setting similar to the one struck down in that case.

Bollenbach v. Bd. of Educ. of the Monroe-Woodbury Central School Dist., 659 F.Supp 1450 (SDNY 1987), involved requests by Village residents that petitioner Board of Education of the Monroe-Woodbury Central School District ("Monroe-Woodbury") assign only male drivers to transportation routes servicing Satmar male students attending the Village's religious schools because Satmar

religious tenets restricting interaction between the sexes prevented the male students from boarding buses driven by female drivers and from taking instructions from them. To accommodate these requests, Monroe-Woodbury removed the female drivers even though they were entitled to the routes as a result of their seniority pursuant to the terms of their existing collective bargaining agreement. 659 F.Supp at 1453. However, it eventually became necessary to reassign female drivers to these routes and Village residents commenced an action before the United States District Court for the Southern District of New York alleging, *inter alia*, that the failure to provide them with male drivers violated their rights under the Free Exercise Clause of the United States Constitution. 659 F.Supp at 1454-55.

Basing its decision on this Court's ruling in *Bowen v. Roy*, 476 U.S. 693 (1986), the District Court ruled that "failure to tailor bus service to the Hasidim's belief would not violate the Free Exercise of the Constitution" holding that attempts to alter "bus service to suit the religious tenets of the Hasidim violated the Establishment Clause" 659 F.Supp at 1470. According to the District Court, the deployment of only male drivers would have the primary effect of advancing Hasidic religious beliefs and result in both excessive administrative and political entanglement. 659 F.Supp at 1464-1466.

At present, the school district created by the statute before this Court bears the statutory responsibility of providing transportation to the *Bollenbach* students to and from their private religious schools.

Board of Education of the Monroe-Woodbury CSD v. Wieder, 134 Misc.2d 658 (1987); 132 AD2d 409 (2d Dept. (1987)); 72 NY2d 174 (1988), concerned the issue of whether Village residents were entitled to obtain publicly-funded special education and related services in an environment separate from non-Satmar students. In 1983, Village residents had formed a school for children with disabilities within an annex to the Village's religious school for girls. The school was attended not only by Village residents but also by children with disabilities from other Hasidic communities in a neighboring county. Monroe-Woodbury public school teachers offered special education classes within the school until that school district terminated such services in response to this Court's decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). 72 NY2d 174, 180. Thereafter, Monroe-Woodbury proceeded to place these children in classes within its public schools in accordance with the individualized education plan required and developed for each child under federal and state law. Monroe-Woodbury also engaged in attempts to integrate the Satmar children into the public school environment by securing the services of Yiddish-speaking teachers, and providing the parents with bilingual reports. 72 NY2d at 181.

Despite reports submitted to the *Wieder* courts that Satmar children who, for a while, attended the programs in the public school facilities indeed continued to progress, Satmar parents refused to continue sending their children to Monroe-Woodbury's public schools alleging that the programs offered their children were inappropriate because of the fear and trauma experienced by the

children when leaving their own community and being with people whose ways were so different from theirs. The Satmar parents held firm to their position that the bilingual and cultural needs of their children could be satisfactorily met only within the confines of a separate environment. *Id.*

Monroe-Woodbury then sought a judicial declaration that under New York's Education Law it lacked the statutory authority to provide services to the Village children except within its own public schools. Instead, the lower court in *Wieder*, directed Monroe-Woodbury to provide the necessary services at a location not physically or educationally identified with the Village but, nonetheless, reasonably accessible to the children. 134 Misc.2d 658, 662-663. Monroe-Woodbury then appealed that order and the Appellate Division, Second Department, reversed after determining that the provision of services in a separate environment addressed parental concerns for their religious and social practices rather than secular factors such as the nature of the children's disability, in violation of the Establishment Clause. That court further ruled that Monroe-Woodbury could provide the required services only within its public school facilities, not separate from public school students. 132 AD2d 415-416, 417-418; 72 NY2d 181-82.

On appeal to the New York Court of Appeals, that court did not reach the constitutional issue, limiting itself to interpreting whether New York's Education Law required Monroe-Woodbury to provide services to Village residents only in its public schools or at some other facility. That court then ruled that the applicable statutory provisions required neither. In its decision, the Court of

Appeals refused to address the argument that the placement of Village children in Monroe-Woodbury's public schools rather than in their own schools or at a neutral site "interfere[d] with the free exercise of their sincere religious beliefs . . . " 72 NY2d 174, 188. Contrary to the suggestion by petitioner Board of Education of the Kiryas Joel Village School District ("KJVSD"), at pp. 7-8, 30 of its brief, the Court of Appeals' refusal was based solely on the fact that this was not the claim the Village residents had asserted and supported below.

D. Establishment of the Kiryas Joel Village School District.

The New York Governor and the Legislature enacted Chapter 748, ("the statute"), subsequent to the New York Court of Appeals decision in *Wieder*. The legislative history of the statute clearly indicates they both understood the legislation was designed to provide an insular religious community with its own school district so that its children could receive an education within an insular environment. Both the Legislature and the Governor understood that the need for this exclusivity was dictated by religious beliefs and traditions. (J.A. 19-20, 38-39, 40-42).

Indeed, prior to the enactment of the statute, the New York State Commissioner of Education, through his counsel, expressed numerous concerns that a school district designed to be attended by members of only one religious sect involved government in the "furtherance of religion" in violation of the Establishment Clause. (J.A. 28). The Commissioner also expressed his view that the

statute cannot be supported against "the goal of maintaining diversity . . . and ensuring that school district boundaries are not drawn in a manner that segregates pupils along ethnic, racial or religious lines" *Id.* Purportedly established to serve the Village's disabled students, the KJVSD is empowered to serve a general student population as well. However, non-disabled students residing within the Village were always expected to continue attending their religious schools. (J.A. 21-22, 32). Moreover, it was always envisioned that the KJVSD would only serve Hasidic students. (J.A. 22).

As further indicated by the Commissioner, the establishment of the KJVSD runs counter to New York State's Master Plan for School District Reorganization which, pursuant to New York Education Law § 314, promotes the reorganization and consolidation of smaller school districts to encourage economy and efficiency in the state's public education system. Affidavit of Hon. Thomas Sobol ¶ 16 (J.A. 81). As of October 29, 1990, when the KJVSD first became operational, only 33 students were enrolled and receiving services from the district. Twenty of those were nonresident Satmar students, including three from petitioner Monroe-Woodbury. Affidavit of Hon. Thomas Sobol, ¶ 16 (J.A. 81); Affidavit of Hannah Flegenheimer, ¶ 17 (J.A. 89). Based on data submitted to the New York State Education Department by the KJVSD, during the 1991-1992 school year, the KJVSD served only 10.9 full-time resident students. During the 1992-1993 school year, the KJVSD served 13 full-time students and 95 parochial school students on a part-time basis in addition to 29 nonresident students. Affidavit of Hon. Thomas Sobol, at

¶¶ 8-11 (Resp. App. 3-4); Affidavit of Gregory Illenberg, at ¶¶ 15-17, 22, 24 (Rep. App. 9, 10).

Despite representations to the contrary, the KJVSD is unlike other union free school districts created to provide educational services exclusively to students with disabilities. (KJ Brief at 8 fn3). Those school districts, unlike the KJVSD, are associated with private child care institutions and are statutorily governed by Article 81 of New York's Education Law. Their powers are limited by statute and the very legislative acts which create them. Their student population is not set along geographical boundary lines. Children are placed there by family court, the local social services district, or the division for youth. Unlike, at the KJVSD, children are placed at those school districts only after a determination that the institution offers the least restrictive educational environment for students placed there. (J.A. 29). In addition, those school districts, unlike the KJVSD, may not refuse placements of students who are residents of other public school districts. Neither are they authorized to serve a general student population.

Indeed, although purportedly established to provide services only to the Village's disabled students, during the pendency of this litigation, the KJVSD initiated plans, now in abeyance, to establish a regular education kindergarten program. (Resp. Pet. 20, 23, 24). Also, unlike those school districts, the KJVSD is responsible for providing both disabled and nondisabled parochial school students with remedial instruction, transportation, textbooks and health and welfare services. *See*, e.g., New York Education Law §§ 701; 912; 1709; 3602-c; 3635).

E. Education of Children with Disabilities

Pursuant to both federal and state law, school districts must provide children with disabilities with a "free appropriate public education" which requires that "special education" and "related services" be provided at public expense, in conformity with an "individualized education program" (IEP), tailored to meet the unique needs of the individual student with disabilities. All students with disabilities are entitled to receive these services in the district where they reside.

A child's IEP must identify the child's special education needs and the annual goals for the child, based on a comprehensive evaluation of the child and developed with the participation of the child's parents. Educational services must be provided in the "least restrictive environment," (LRE) appropriate to meet the needs of the student as identified in the IEP. Parents disagreeing with the placement of their child may request a due process review hearing, and ultimately may appeal any such decisions to the Courts. Affidavit of Hannah Flegenheimer, ¶¶ 7,9,11 (J.A. 85, 86); 34 CFR 300.500-300.514; 8 NYCRR 200.5.

"Special classes, separate schooling, or other removal of handicapped children from the regular educational environment . . . occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" *Id.* at ¶ 11 (J.A. 86). Students who cannot benefit from instruction in a regular classroom, must, nonetheless, be afforded the opportunity to

interact with their non-handicapped peers in non-academic areas, i.e., recess, lunch, music, art, gym, etc. *Id.* at ¶ 12 (J.A. 86).

The KJVSD, as a school district established to serve only disabled children, is unable to provide its students the opportunity to be placed in regular education classes with non-disabled children, or to interact in nonacademic areas with their non-disabled peers. *Id.* at ¶ 23 (J.A. 90).

F. The Decisions Below

Respondents commenced this action in New York State Supreme Court, Albany County, seeking a declaration that Chapter 748 was constitutionally infirm under both the Federal and State Constitutions. Applying the tripartite test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court ruled the statute violated all three prongs. According to the court, the statute lacked a secular purpose because it created a governmental unit, a school district, to meet the exclusive "parochial" needs of the Village residents. The creation of the KJVSD, the lower court found, was nothing less than "an attempt to camouflage, with secular garments, a religious community as a public school district." (K.J. Pet. App. 100a). According to the lower court, the Village and its coterminous school district "is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave." *Id.* "Labeling the village as a 'union free public school district' cannot alter reality." (K.J. Pet. App. 99a).

The lower court further found the statute also failed the second prong of *Lemon* because "rather than serving a

legitimate governmental end, [it] was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district." (K.J. Pet. App. 99-a). In addition, the statute fostered excessive governmental entanglement with religion in violation of the third prong of *Lemon* because it placed the New York State Education Department, the state agency responsible for overseeing implementation of the statute, in the position of having to "take special steps to monitor the . . . school district to ensure that public funds are not expended to further religious purposes" (K.J. Pet. App. 100-a).

In a 4 to 1 decision, the Appellate Division, Third Department, affirmed the lower court's determination that Chapter 748 was unconstitutional. Responding to the position advanced by the dissent and the petitioners herein that the legislation had the secular purpose of providing needed special educational services to Village residents not receiving the services, the Appellate Division majority noted that the design of the statute was not merely to provide special education services to the Village's disabled students, "but to provide those services within the Village, so that the children would . . . avoid mixing with children whose language, lifestyle and environment are not the product of [their] religion" (K.J. Pet. App. 67a).

The Appellate Division majority further determined that the legislation had the principal or primary effect of advancing religion because the creation of the KJVSD coterminous with a religious community "to provide within that enclave services that were already available elsewhere" effected an impermissible union between

church and state "[r]egardless of how scrupulous the district is in maintaining the secular nature of the educational services offered at the school" (K.J. Pet. App. 69a-70a). The Appellate Division saw no need to consider the third prong. *Id.* at 73a.

The New York State Court of Appeals, by a 4 to 2 vote affirmed the determination of the Appellate Division that Chapter 748 has the impermissible primary effect of advancing religion. According to the Court of Appeals, because services were already available from Monroe-Woodbury, the primary effect of the statute was to yield to the demands of the Satmar community that their children be insulated from others in accordance with their religious practices. (K.J. Pet. App. 15a). Thus, the statute effected a symbolic union between church and state "sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices" (K.J. Pet. App. 12a).

Counter to the dissent, the Court of Appeals plurality refused to view the statute as part of a general government program, because it was intended to benefit one religious group, rather than to provide services without regard to the locality and environment in which said services are provided. (K.J. Pet. App. 14a; 20a, 24a-25a; 32a). The plurality also refused to view the statute as effecting "a 'unit on a neutral site' serving only sectarian pupils" determining, instead, that, by creating an entirely new school district, the statute exceeded any directive by this Court or the Court of Appeals concerning the provision of services to children at a neutral site. (K.J. Pet.

App. 15a). However, the Court of Appeals did not dismiss the possibility reflected in Judge Kaye's concurrence, that consistent with observations made by the Court of Appeals in its *Weider* decision, *supra.*, there, "may well be that certain of the services in controversy could be furnished to [Village residents] at neutral sites . . . in conformity with constitutional principles" *Id. See, Board of Education of the Monroe-Woodbury Central Dist. v. Wieder*, 72 NY2d at 189 fn3.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents a facial challenge to a New York State statute which confers upon an exclusive religious community the extraordinary benefit of a separate public school district to enable that community to receive public educational services in an environment which conforms with the community's religious beliefs and traditions. The statute carved out a new school district for this community even though the services to be provided therein had always been available from the school district to which the community previously belonged.

This statute violates fundamental Establishment Clause principles which prohibit "sponsorship, financial support, and active involvement of the sovereign in religious activity" *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970); and preclude government from imbuing a religious sect with governmental powers, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), or providing a denominational preference *Larson v. Valente*, 456

U.S. 228 (1982). Irrespective of whatever standard may be used in assessing Establishment Clause violations, the statute violates these fundamental principles.

Chapter 748 is not a constitutionally permissible accommodation of religion. Petitioners do not identify a governmentally imposed burden on the free exercise of Satmar religious beliefs and practices as required by this Court's precedents. *See, Allegheny County v. Greater Pittsburgh ACLU* , 492 U.S. 573, 613 (1989), citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S., at 348 (O'Connor, J., concurring in judgment). Even if the petitioners had identified a specific governmentally-imposed burden, nonetheless, the extraordinary accommodation of government utilizing its instrumentalities to provide a religious community with a separate public school district in accordance with religious beliefs and practices fosters religion in violation of the Establishment Clause. The statute requires the active participation of government in the pursuit of private religious practices.

The New York Court of Appeals properly determined that the statute has the primary effect of advancing religion in violation of the second prong of this Court's three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As the Court of Appeals found, the cultural needs of the children of Kiryas Joel are inextricably linked to fundamental Satmar religious beliefs which define the essence of Satmar culture, and dictate, in relevant part, that Satmar children be educated separately and apart from non-Satmar students. Thus, the remedy effected by the statute herein establishes an impermissible union between church and state which has the primary effect of

advancing religion. This impermissible symbolic union is furthered by the law's "overbreadth" which grants the school district "vast" powers well beyond those necessary to address the concerns of the Village residents. (K.J. Pet. App. 26a-27a). The remedy effected by the statute goes well beyond the suggestion of the Court of Appeals in *Monroe-Woodbury v. Wieder*, 72 NY2d 174, 189 fn3 when it held, "it may well be that certain of the services in controversy could be furnished to defendants at neutral sites . . . in conformity with constitutional principles."

Assertions that the KJVSD, in its operations, provides secular services, does not correct the constitutional infirmity because the statute was itself enacted to create a school district which separates people along religious lines and, therefore, its very existence violates the Establishment Clause.

Petitioners' reliance on this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977) for the proposition that the KJVSD is a functional equivalent of a "neutral site" facility is misplaced. In *Wolman* this Court held constitutional the provision of a neutral site off the premises of a religious school for children to receive therapeutic and remedial services. This Court held the neutral sites constitutional even though the Court understood that such neutral sites *on occasion* might serve only sectarian pupils. Here in contrast, the KJVSD serves only Satmar children by design. Furthermore, unlike the neutral sites in *Wolman* which this Court upheld because their existence was based upon considerations of safety, distance and the adequacy of accommodations, the KJVSD was created solely upon considerations of the religious background of the children it serves.

The statute also fails the first prong of *Lemon* because it has no secular purpose. Finally, the statute also fails the third prong of *Lemon* because it fosters an excessive entanglement with religion.

ARGUMENT

I. CHAPTER 748 VIOLATES FUNDAMENTAL ESTABLISHMENT CLAUSE PRINCIPLES

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." Written as a broad charter, the Clause has come to prohibit more than the establishment of a state or national religion. It also forbids government from undertaking actions which favor religion over nonreligion, or a particular denomination over another. *See, e.g., Lee v. Weisman*, 112 S.Ct. 2408 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Larson v. Valente*, 456 U.S. 228 (1982).

At its most fundamental level, the Establishment Clause represents the Framers' attempt to protect a democratic nation from political fragmentation along religious lines by precluding government from "exert[ing] its power in the service of any purely religious end . . . [and from] mak[ing] of religion, as religion, an object of legislation" *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 234 (1963) (Brennan, J., concurring). Based on the premise that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere[,]" *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948), the Clause, at

its very core, denounces "sponsorship, financial support, and active involvement of the sovereign in religious activity" *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 668 (1970).

Application of these principles to specific cases has at times been made difficult by debate over what specific standard to employ in assessing alleged violations of the Clause. However, the standard generally used to make such determinations is the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which petitioners urge this Court overrule, if necessary, to uphold the constitutionality of the statute at issue herein. Cf. *Zobrest v. Catalina Foothills School Dist.*, ___ U.S. ___, 113 S.Ct. 2462 (1993), *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992) *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, *supra*. The test, with its purpose, primary effect and entanglement prongs distills the factors considered by the Court in pre-*Lemon* cases. *See*, *School Dist. of Abington Township v. Schempp*, *supra* at 222 ("The test may be stated as follows: what are the purpose and the primary effect of the enactment?); *Walz v. Tax Comm'n of the City of New York*, *supra* at 674 (the end result of a statutory enactment may not be "excessive government entanglement with religion").

For the reasons set forth below at Point III, Chapter 748 fails all three prongs of the *Lemon* test. But should this Court choose to overrule *Lemon*, the statute would nonetheless remain constitutionally infirm under any alternatively adopted standard which sustains the fundamental principles of the Establishment Clause and this Court's past precedents. The contested statute clearly contravenes both.

Indeed, as ruled by the courts below, the statute communicates an endorsement of religion. An objective observer familiar with the facts and circumstances leading up to the creation of the KJVSD is likely to perceive the creation of the KJVSD as such an endorsement. (J.A. 70a). Furthermore, this Court has repeatedly indicated that Establishment Clause violations do not depend upon a showing of direct governmental coercion. *See, Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223; *Engle v. Vitale*, 370 U.S. 421, 430 (1962). Therefore, respondents urge this Court not to adopt such a standard as this Court's sole criterion for assessing Establishment Clause violations. In addition, a coercion standard does not necessarily address all the various ways in which the Establishment Clause could be violated, resulting in the possible evisceration of the Establishment Clause.

As set forth above, as a matter of legal form, the Satmar community of Kiryas Joel is an incorporated municipality of the State of New York. Reaching past mere formalism, however, the Village is, as a matter of fact, a religious enclave under the control and supervision of the Satmar religious leadership which exercises its religious authority over all aspects of daily life from dress to diet, from cradle to grave. The establishment of a separate public school district within the exclusive boundaries of the Village, imbues this religious community with the qualities of a governmental unit authorized to exercise discretionary governmental powers in the arena of public education. Following a longstanding intractable religious problem over the manner in which

public special education services were to be provided to Village residents, the statute effects nothing less than the empowerment of the Satmar community of Kiryas Joel to tailor public education to meet the requirements of its religious beliefs and traditions.[2] Such delegation effectuates the very type of intrusion between church and state into the precincts of the other which the Framers sought to foreclose, *see, e.g., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). Indeed, "[t]he Framers did not 'set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions'." *Id.*

Furthermore, Chapter 748 is not a statute of general applicability which extends its benefits without regard to religion. *See, Zobrest v. Catalina Foothills School Dist.*, 112 S.Ct. 2462 (1993). Instead, the statute aims to benefit exclusively one religious sect. It provides the Satmar community of Kiryas Joel with its own public school district where Satmar children can be educated separate from non-Satmar students. As anticipated at the time of the statute's enactment, should any non-Hasidic child move into the Village "(and this would be virtually impossible)" he or she would be tuitioned to neighboring Monroe-Woodbury. (J.A. 22). Consequently, the statute effects a preferential treatment of the type forbidden by

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[2] It was understood when the statute was adopted that Satmar religious preferences dictate that children be educated separately. Indeed, the statute was adopted in response to this requirement. Therefore, any allegations as to the secular operation of the district does not correct the constitutional infirmity brought about by the very formation of the district. (J.A. 19-20 38-39, 40-42).

the Establishment Clause, *see, e.g., Larson v. Valente, supra,* for "a forbidden denominational preference can result from a grant of benefits to one religious group as readily as discrimination among sects" (K.J. Pet. App. 23a).

Nowhere in Establishment Clause jurisprudence has this Court been more vigilant than in cases involving religion and public education, where government's activities "can have a magnified impact on impressionable young minds" and "a union of church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *School Dist. of the City of Grand Rapids v. Ball,* 473 U.S. 372, 383, 390 (1985). "[T]he symbol of our democracy and the most pervasive means of promoting our common destiny[,]" *Edwards v. Aguillard,* 482 U.S. 578, 584 (1987), citing *Illinois ex. rel. McCollum v. Board of Education,* 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.), public schools must discharge their public function of training students for citizenship in a heterogeneous democratic society ". . . in an atmosphere free of parochial, divisive, or separatist influences of any sort. . . " *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 241-242 (1963) (Brennan, J., concurring). (*Bethel School Dist. No. 403 v. Fraser,* 106 S.Ct. 3159 (1986)).

Upholding the creation of a separate public school district along religious lines to oblige a religious sect's separatist practices would contravene these fundamental principles. Indeed, as the lower court observed, "[t]he strength of our democracy is that a multitude of religious, ethnic and racial groups can live side by side with respect

for each other." (K.J. Pet. App. 101a). *See generally, Brown v. Board of Education*, 347 U.S. 483 (1954). Governmental action effectuating the separation of public school students along religious lines conveys the opposite message to our nation's children in contravention of the principles espoused by the Establishment Clause. "To hold that a state cannot consistently with the First Amendment . . . utilize its public school system to aid any or all religious sects in the dissemination of their doctrines and ideals, does not . . . manifest a governmental hostility to religion or religious teachings." *McCollum v. Board of Education, supra* at 211.

II. CHAPTER 748 IS NOT A VALID ACCOMMODATION OF RELIGION

Petitioners KJVSD and Monroe-Woodbury urge this Court to uphold Chapter 748 as a valid accommodation of religion. (KJ Brief at 40-43; MW Brief at 38-45). They do not contend that the accommodation is mandated by the Free Exercise Clause, but rather assert that it is permissive. (KJ Brief at 42). However, petitioner KJVSD does not advance a specific free exercise claim.

To be permissible under the Establishment Clause, governmental accommodation of religion must lift an identifiable burden on the free exercise thereof imposed by government itself. *See, e.g., Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also*, McConnell,

Accommodation of Religion, 1985 S.Ct. Rev. 1, 3-4. Here, the KJVSD itself fails to articulate the religious belief or practice infringed upon, the nature of the burden allegedly lifted by the statute, and the particular circumstance through which government had imposed any such burden on the residents of Kiryas Joel.

Assuming arguendo, that Chapter 748 indeed constitutes an effort to lift an identified governmentally imposed burden on the free exercise of Satmar religious beliefs and precepts, the issue then becomes whether the creation of the KJVSD to lift such a burden survives constitutional scrutiny under the Establishment Clause. As this Court has observed, government may act to accommodate religion, but at some point, "accommodation may devolve into 'an unlawful fostering of religion' " in violation of the Establishment Clause. *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos, supra* at 334-335; *Hobbie v. Unemployment Appeals Comm'n of Florida, supra* at 144; *see, Thomas v. Review Board of Indiana Employment Security Division, supra* at 719; *Sherbert v. Verner, supra* at 409. Although this Court has never before reviewed such a case, respondents respectfully submit that the alleged accommodation effected by Chapter 748 constitutes an unlawful fostering of religion. The statute imbues a religious community with discretionary governmental powers and establishes an impermissible symbolic union between church and state. *See,* discussion at Points I and III.

Furthermore, this case presents an "alleged" accommodation which does not fall along the lines of previous accommodation cases reviewed by this Court, and relied upon by petitioners. Those cases involved claims for exemption from laws of general applicability, *see, e.g.,*

Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos, supra; Hobbie v. Unemployment Appeals Comm'n of Fla., supra; Bowen v. Roy, supra; Sherbert v. Verner, supra, and petitioners herein have made no claim for an exemption. Instead, this case involves the extraordinary measure taken by the State of New York of creating a public school district for the exclusive benefit of a religious community in order to oblige the religious beliefs and practices of that community. Moreover, unlike previous accommodation cases where government merely granted an exemption which allowed the private pursuit of religious beliefs and practices, Chapter 748 requires the State of New York itself to allocate its resources in the pursuit of the religious beliefs and traditions of the Satmar community of Kiryas Joel.

To the extent petitioners rely on this Court's decision in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), (KJ Brief at 41-42; AG Brief at 25, 29, 31; MW Brief at 39-41), respondents submit that case is inapposite. Petitioners rely upon *Yoder* for the proposition that since this Court in *Yoder* did not find that accommodating the requests of the Amish to have their children exempted after the eighth grade from compulsory school attendance constituted government sponsorship or active involvement in Amish beliefs, (KJ Brief at 42), Chapter 748 likewise does not sponsor or support Satmar religious precepts. However, as set forth above, in *Yoder,* unlike the present case, the Amish, after demonstrating a clear free exercise claim, were provided with an exemption from a generally applicable state law and the State of Wisconsin was not required to actively sponsor or support Amish beliefs. In the present case, the contested legislation actively involves the State of New

York in sponsoring and supporting Satmar separatist religious preferences by going to the extraordinary length of providing this insular religious community with its own separate school district.

The alleged accomodation effected by the statute herein, might be "laudatory and reflect the political process straining to meet the parochial needs of a religious group" but it nevertheless violates the Establishment Clause. (K.J. Pet. App. 100a).

III. CHAPTER 748 FAILS CONSTITUTIONAL SCRUTINY UNDER THE THREE-PART TEST OF *LEMON V. KURTZMAN*.

To survive constitutional scrutiny under the three-part test articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), legislation must have a secular purpose and a principal or primary effect which neither advances nor inhibits religion. In addition, it may not foster excessive entanglement between church and state. Failure to satisfy any of these criteria has been deemed to effect a violation of the Establishment Clause. The New York State Court of Appeals in its decision below declared Chapter 748 unconstitutional on the basis that it violated the second prong of *Lemon*. Respondents submit that this determination was proper. In addition, the statute lacks a secular purpose and fosters excessive governmental entanglement with religion.

That respondents maintain this litigation as a facial challenge to the statute in no way impairs this Court's ability to affirm the determination below that Chapter 748 is constitutionally infirm. Petitioner KJVSD suggests that

this Court's ruling in *United States v. Salerno*, 481 U.S. 739, 745 (1987) and others preclude a finding of facial invalidity arguing that, in this case, it cannot be said there is no "set of circumstances under which the Act would be valid" (KJVSD Brief at 19-20). However, this Court has, indeed, previously entertained Establishment Clause challenges to statutes solely on their face. *See, Bowen v. Kendrick*, 487 U.S. 589, 600-601, 602, citing *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Moreover, this Court in *Bowen v. Kendrick* refused the invitation to apply such a standard in the context of its Establishment Clause jurisprudence. Indeed, the adoption of such a standard would eviscerate the Establishment Clause. 487 U.S. 589, 627 fn.1 (Blackmun, J., dissenting).

Furthermore, petitioners' reliance in *Bowen v. Kendrick, supra*, for the proposition that Chapter 748 survives constitutional scrutiny under *Lemon* is misguided, as that case is factually inapposite to the present one. In *Bowen v. Kendrick*, the benefit accruing to religious organizations under the Adolescent Family Life Act (AFLA) resulted from a program that enabled religious organizations to become grantees along with a broad-based spectrum of other organizations whose cooperation the government sought in an effort to integrate and coordinate a multiplicity of services. Also, in that case government sought the assistance of non-governmental organizations because government alone could not successfully provide the services set forth in AFLA. By contrast, the religious community benefited by the statute herein is its sole

intended beneficiary, and public education, unlike the services under AFLA is an exclusive public function which government can fulfill on its own. Likewise, this Court's decision in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970) is inapposite because the tax exemption upheld there for religious organizations was granted as part of a benefit afforded to a broad class of property owners, not just to religious organizations.

A. Chapter 748 has the Primary Effect of Advancing Religion.

The relevant inquiry under the "effect" criterion is whether, irrespective of its actual purpose, a contested governmental act has the principal or primary effect of advancing or inhibiting religion. *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). As the New York State Court of Appeals observed, this prohibition extends beyond acts directing or funding efforts at religious indoctrination. (K.J. Pet. App. 10a). It also precludes state action which "fosters a close identification of [governmental] powers and responsibilities with those of any or all religious denominations." It forbids any " 'symbolic union of church and state' which conveys a message of government endorsement or disapproval of religion . . . " *Grand Rapids, supra*, at 389. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Chapter 748 fosters a symbolic union between state and church which impermissibly advances Satmar religious beliefs and practices.

(1) Neutral Site Equivalency – Characterizing the KJVSD as the functional equivalent of a "neutral site"

facility, petitioners urge this Court to uphold the constitutionality of Chapter 748 pursuant to *Wolman v. Walter*, 433 U.S. 229 (1977). (KJ Brief at 30; AG Brief at 20; MW Brief at 32). In that case, this Court concluded that it was permissible to provide parochial school students with therapeutic and remedial services at a neutral site off the premises of the religious school, even if *on occasion* such a site might serve only sectarian pupils. However, as the New York Court of Appeals observed in its decision below, Chapter 748 goes beyond any directive sanctioning the provision of services to parochial school students at a neutral site. (K.J. Pet. App. 15a). The KJVSD was created not based on "considerations of safety, distance and the adequacy of accommodations" contemplated by this Court in *Wolman*, but rather on the preferences of the Village community for a segregated educational environment.

In addition, the KJVSD is a fully operational school, rather than the type of neutral site sanctioned by this Court in *Wolman* and other courts in cases such as *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Walker v. San Francisco Unified School Dist.*, 761 F.Supp. 1463 (N.D. Cal. 1991), and indeed contemplated by the New York State Court of Appeals in *Monroe-Woodbury v. Weider*, 72 NY2d 174, 189 for parochial school students to receive *supplemental* services such as remedial instruction and therapeutic assistance. The constitutional infirmity in the present case arises not from the provision of supplemental services at a separate facility in accordance with this Court's ruling in *Wolman*. Rather, it arises from the creation of a fully operational school deliberately established along religious lines to replace a public school

environment. Therefore, "the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion" (K.J. Pet. App. 15a).

In this context, given that Monroe-Woodbury appears before this Court defending the KJVSD as the constitutional functional equivalent of a neutral site, there should be no impediment for Monroe-Woodbury to provide supplemental services at such a neutral site if this Court affirms the decisions below. Moreover, the Commissioner of Education of the State of New York, has indicated "the State Education Department is fully prepared to assist the Monroe-Woodbury Central School District to provide appropriate special educational services to all children entitled to receive them from the Kiryas Joel Village School District" Affidavit of Hon. Thomas Sobol, ¶ 6 (Resp. App. 2-3).

(2) Religious v. Secular Need for Separation – According to petitioners, the Court of Appeals' decision is erroneously based on a misconception that Satmar religious tenets prevent Satmar Hasidim from interacting with persons of other faiths, (KJ Brief at 29), and a failure to recognize that the KJVSD boundary lines were drawn to meet unique secular needs. (KJ Brief at 29-30; AG Brief at 18; MW Brief at 7, 16).

Such an assertion, however, belies the understanding of the New York State Legislature and the Governor that enactment of Chapter 748 effected a resolution of a *religious* conflict. (J.A. 19; 38; 40). Moreover, it impugns the position previously taken by Village residents before the

New York Court of Appeals in *Board of Education of the Monroe-Woodbury CSD v. Wieder*, 72 NY2d 174, 188, where they asserted a free-exercise right to a separate educational facility. In that case, unlike in the present action, Village residents argued that "public school placements interfere with the free exercise of their sincere religious beliefs . . . [and] that compelling the children to attend regular public school classes and programs forces them to choose between following the precepts of their religion and foregoing benefits on the one hand, and accepting benefits while violating their religious beliefs on the other." (citations omitted). Despite representations to the contrary, the *Wieder* Court did not reject this argument on the merits. (KJ Brief at 7-8). Rather, it noted it could not entertain the argument because, that was not the claim the Satmarer had raised in the lower courts. Similarly, here the KJVSD did not make any Free Exercise argument until the Court of Appeals, when it argued in the alternative that the statute accommodated a religious observance.

Petitioners' assertions are also contrary to the understanding of the Attorney General in his initial defense of Chapter 748, when both at Point II of the brief and during oral argument before the lower court, he argued that "The Statute Does Not Support Religion, And Removes A Deterrent To The Free Exercise Of Religion."

In this context, representations that the Court of Appeals in *Wieder* ruled "the emotional impact on the children of traveling outside the Village was a 'non-religious reason' for taking the children out of . . . Monroe-Woodbury" (KJ Brief at 30) are misleading because that court did not address this issue. Instead, in

refusing to entertain a free exercise argument raised for the first time before it, the Court of Appeals merely acknowledged that the Village residents' claims for exemption from public school placements were based only on reasons, characterized by Village residents as nonreligious. (72 NY2d 188-189).

Additionally, assertions that Chapter 748 meets the requirements of the second prong of *Lemon* because it provides for secular bilingual, bicultural services lacking in Monroe-Woodbury (AG Brief at 16) are equally misleading. As the Court of Appeals' decision in *Wieder* indicates, Monroe-Woodbury undertook efforts to accommodate the bicultural, bilingual needs of the Satmar community, including the employment of Yiddish-speaking teachers and the provision of reports for the Satmar parents in Yiddish. (72 NY2d at 181). As such, prior to the creation of the KJVSD, Village residents were offered such services. Furthermore, since, before the Appellate Division in *Wieder*, Village residents asserted their willingness to forego instruction in Yiddish if that court granted their request for a site where their children could be educated separate from non-Satmar students, they very clearly articulated that it was a separate site which they were after and not bicultural, bilingual services. (132 AD2d at 415-416).

Further assertions that the statute merely confers an incidental benefit on Satmar beliefs and traditions, (AG Brief at 19), are equally unavailing because a segregated environment in which to pursue their traditions is precisely what the Village residents sought and the statute afforded them.

(3) Shared Religious Heritage – Petitioners further argue that simply because the Village residents share a common religious heritage the State should not be precluded from enacting the contested legislation herein, nor should the Village be deprived of its own public school district merely because the board of education will of necessity be composed only of Satmarer. (KJ Brief at 16, 33-35; AG Brief at 21-23; MW Brief at 8, 20-23). In this context, petitioners' reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), is misguided because that case is factually inapposite to this one. There, in invalidating a Tennessee law which disqualified clergymen from participating as delegates to that state's constitutional convention, this Court noted the absence of any evidence that clergymen would be unable to discharge the duties of public office unfettered from anti-establishment interests. (435 U.S. 618, 629). Here, however, the record reflects that the religious leadership of the Satmar Hasidim has exerted its influence over the operations of the KJVSD and its board of education members. This point is illustrated in the case of *Waldman v. United Talmudic Academy*, 147 Misc. 2d 529 (1990) where the only individual to run for the KJVSD board of education without the approval of the Satmar religious leadership endured retaliatory acts from members of the community, including his expulsion from the Village's main congregation and the expulsion of his children from the Village's official parochial schools. 3 R. 590-641. Therefore, the instant case presents a veritable risk that the public officials assuming office pursuant to the statute will not be able to discharge their public duties without regard to religious considerations.

In arguing that the common religious heritage shared by the Village residents should not preclude them from obtaining a separate school district, the petitioner Attorney General attempts to distinguish the decision of the United States Court of Appeals for the Second Circuit in *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235. There, the Second Circuit invalidated a plan by the New York City Board of Education to close off a section of a public school facility for exclusive use by Satmar students. Contrary to the representations of the Attorney General, the Second Circuit did not hold the plan unconstitutional "because it made too many accommodations" to Satmar religious tenets. (AG Brief at 18). Rather, the Second Circuit specifically ruled that the separation of Hasidic students from the general student population to oblige Satmar beliefs and practices prescribing separatism from those they consider undesirable constituted a prohibited establishment of religion. (803 F.2d 1238) (Counterstatement of the Case at 8-10). In so ruling, the Second Circuit observed that the need for the Satmarer to be separate was their belief that their children would be corrupted by non-Satmar students. "[They] want to be separate. It's intentional." 803 F.2d 1235 at 1238.

(4) Nature of Services Provided – Petitioners also maintain that Chapter 748 does not advance religion because it merely allows for the provision of "appropriate" secular services, (KJ Brief at 28; AG Brief at 16, 23), in an environment hospitable to the unique Satmar culture and traditions (AG Brief at 16; MW Brief at 7, 16). However, the need for an educational environment "receptive to the particular sensitivities and vulnerabilities" of the Village residents is inextricably linked to Satmar religious

traditions pursuant to which Village residents look to their schools as "a bastion against undesirable acculturation." (Resp. App. 17). Moreover, as petitioner KJVSD itself acknowledges, Village residents could have secured "appropriate" services from Monroe-Woodbury, by availing themselves of their statutory right to administrative and judicial review of any inappropriate decision affecting the education of their children. (KJ Brief at 28).

In this context, the argument that the statute's effect was to cut through any disputes concerning the appropriateness of services for Satmar children, and to "avoid child-by-child adversarial administrative proceedings" (KJ Brief at 28) is without legal foundation. Such an approach would violate both federal and state laws governing the education of children with disabilities which require that such children be educated pursuant to an "individualized education program" that addresses each child's distinctive disability and places the child in the least restrictive environment. (Counterstatement of the Case at 17-18). In addition, the suggestion that a wholesale approach is appropriate discounts the evidence submitted by Monroe-Woodbury in the *Board of Educ. of the Monroe-Woodbury CSD v. Wieder, supra,* "pointing to the progress made by Satmarer children who actually attended the public school programs" 72 NY2d 174, 181, and exceeds the alternative solution contemplated by the New York State Court of Appeals in that case.

Assertions that Chapter 748 does not impermissibly advance religion because the law merely provides for the rendition of services pursuant to "a general governmental program which distributes benefits neutrally" to qualifying children allegedly similar to those upheld in *Zobrest v. Catalina Foothills School Dist.*, ___ U.S. ___, 113 S.Ct. 2462

(1993) are also misguided. (MW Brief at 8). As all members of the New York Court of Appeals plurality expressed below, the creation of a school district for a religious community for the exclusive benefit of that group cannot be equated with the sign language interpreter in *Zobrest*. There, a student received a neutral benefit he was entitled to without regard to the sectarian-nonsectarian nature of the school he attended. (K.J. Pet. App. 14a; 24a; 32a). By contrast, the creation of the KJVSD is not "the fulfillment of an entitlement" (K.J. Pet. App. 32a) which is "in no way skewed towards religion" (K.J. Pet. App. 14a). Rather, it is an act of *de jure* segregation along religious lines designed to benefit one religious group. (K.J. Pet. App. 24a).

Similarly, the creation of a separate school district in and for the Village is unlike the provision of otherwise neutral services such as police and fire protection. (KJ Brief at 16). Police and firefighters render services "to a broad class of citizens defined without reference to religion." In contrast, the KJVSD, provides educational services exclusively to a religious community in an environment designed to conform with their religious preferences. (K.J. Pet. App. 13a-14a; 20a). In addition, the provision of police and fire protection might present constitutional problems in a situation where a particular religious community might ask government to conform the manner in which it renders such services to meet its religious needs or preferences. *See generally, Bowen v. Roy*, 476 U.S. 693 (1986). Claims that the KJVSD is open to all students, irrespective of race or creed, (KJ Brief at 20), begs the question as to why the KJVSD had to be established at all. Indeed, the legislation which was adopted to

"solve a religious problem" was clearly understood by the Legislature and Governor to provide the Satmar community with an exclusive facility in which their children, whose parents were not willing to send them into the heterogeneous Monroe-Woodbury Central Schools, could acquire such services in a homogeneous Satmar environment. (J.A. 19-20; 38-39; 40-42).

B. Chapter 748 Lacks a Secular Purpose.

Even though the New York Court of Appeals did not address the issue below, petitioners assert Chapter 748 survives scrutiny under the first prong of *Lemon* which examines the purpose behind contested governmental actions. Under this criterion, a statute will be deemed constitutionally infirm only if it is wholly motivated by an impermissible purpose. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988), citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Any alleged secular purpose must be sincere. *See, Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) citing *Wallace v. Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring); *Id.*, at 75 (O'Connor, J., concurring in judgment); *Stone v. Graham*, 449 U.S. 39 (1980); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963). For the reasons set forth below, the statute's alleged secular purpose is a sham.

Petitioners contend Chapter 748 is not wholly motivated by an impermissible purpose because the statute sought "to end long years of strife and litigation" (AG Brief at 32-33) so as to ensure the delivery of special education services to the Satmar children of the Village (KJ Brief at 23-24; MW Brief 14-17). However, this argument is unavailing for several reasons. First, the long-

standing conflict referred to is directly linked to Satmar religious beliefs and traditions. (J.A. 19, 39). Second, Chapter 748 was designed to provide special education services already available from Monroe-Woodbury "within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion." (K.J. Pet. App. 67a; *see*, K.J. Pet. App. 30a-36a).

In addition, the KJVSD, although established for the alleged purpose of providing Village residents with special education available pursuant to both federal and state law, is incapable of providing its students with a "free appropriate public education" as defined under said laws. (J.A. 29-30, 84-93). Also, the type of school district created by the statute lacks authority to establish separate schools solely for students with disabilities. (J.A. 29). And, Chapter 748 contravenes New York State's Master Plan for School District Reorganization which, pursuant to New York State Education Law § 314, promotes the reorganization and consolidation of smaller school districts to encourage economy and efficiency in the State's public education system. (J.A. 81).

C. Chapter 748 Fosters Excessive Government Entanglement with Religion.

Having determined that Chapter 748 failed the second prong of *Lemon*, neither the New York Court of Appeals nor the intermediate appellate court found it

necessary to address whether the statute survived scrutiny under the third prong, which asks whether contested governmental acts foster excessive entanglement between church and state. On the other hand, the lower court determined it did because the statute requires the State Education Department, as the agency responsible for overseeing its implementation, to take special steps in its monitoring of the KJVSD "to ensure public funds are not expended to further religious purposes" (J.A. 100a). Indeed, the Governor in signing the statute into law envisioned the potential for entanglement when he warned that the KJVSD "must take pains to avoid conduct that violates the separation of church and state" (J.A. 41) and the Commissioner of Education has stated that "[his] staff in its monitoring capacity is unavoidably entangled in matters of religion" Affidavit of Hon. Thomas Sobol ¶ 12 (J.A. 78).

Petitioners argue to the contrary asserting there is no need for special monitoring because the KJVSD is a secular public school district with public employees rather than a sectarian school, the KJVSD board of education is an autonomous entity independent of the religious leadership overseeing the Village and its parochial schools, and no aid flows to a sectarian institution. These factors, they claim, avert the risk that KJVSD programs will not remain ideologically neutral and, consequently, the need for the type of monitoring which might be deemed constitutionally offensive. (KJ Brief at 35-36; AG Brief at 33-34; MW Brief at 31).

However, this argument belies the lower court's findings that "[t]he Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals

who share common religious beliefs which shape the social, political and familiar mores of their lives from cradle to grave." (K.J. Pet. App. 100a). "Labeling the Village as a 'union free school district' cannot alter reality." (K.J. Pet. App. 99a). *See, Waldman v. United Talmudic Academy*, 174 Misc.2d 529 (1990). Therefore, contrary to petitioners' assertions, special monitoring is necessary to ensure that KJVSD staff and programs remain ideologically neutral.

Moreover, monitoring of the KJVSD cannot be divorced from the historical circumstances which gave rise to its establishment, or from the nature of the powers conferred by Chapter 748. As a full-fledged union free school district, the KJVSD must not only provide special education services to its disabled student population, but it must also provide sundry other services, such as remedial instruction and transportation to the children attending the Village's private parochial schools. The constitutional problems inherent in providing these services to Satmar parochial school students have already been the subject of judicial adjudications ad erse to the Satmar community. *See, Bollenbach v. Board of Educ. of the Monroe-Woodbury Central School Dist.*, 659 F.Supp. 1450 (SDNY 1987); *Parents' Assn. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986). Thus, special monitoring is necessary to ensure the KJVSD does not intentionally or unwittingly circumvent the parameters of those decisions. Affidavit of Hon. Thomas Sobol, at ¶ 12 (J.A. 78-79).

For the reasons set forth above, Chapter 748 fails all three prongs of the *Lemon* test and thus violates the Establishment Clause.

If indeed this Court reverses the decision below the relief which will be provided will be in contravention to the fundamental principles of the Establishment Clause. Respondents respectfully request that, in its decision, this Court consider the observation of the lower court that "the Satmar Hasidic sect enjoys religious freedom as guaranteed by the First Amendment that they are now seeking to circumvent. This short range accomplishment could in the long run, jeopardize the very religious freedom that they now enjoy." (K.J. Pet. App. 101a).

Petitioner Attorney General urges this Court to view this legislation as no more than a "negotiated settlement." (AG Brief 23-24). However, the fact that the KJVSD and Monroe-Woodbury might be pleased with the outcome effected by Chapter 748 does not make it constitutionally sound. The Constitution does not permit government to demonstrate its respect for religious diversity by segregating the nation's citizenry along religious lines. A reversal of the lower court's decision would convey a message to the contrary, in contravention of the intent of this nation's founding fathers.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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